THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 08.10.2007

ARB.P. 5/2007

INDO PACIFIC AVIATION PRIVATE LTD ....Petitioner

-versus-

M/S PAWAN HANS HELICOPTERS LIMITED ...Respondent

Advocates who appeared in this case:

For the Petitioner : Mr N Waziri with Mr Somesh Arora, Mr Praveen Agarwal
For the Respondent : Mr Sandeep Sethi, Sr Advocate with Mr Amit Kumar, Ms Rekha Bakshi, Mr Ashish Kumar and Mr Vivek Singh

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J (ORAL)

1. This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said "Act") for the appointment of an arbitrator.

2. Admittedly, an agreement between the petitioner and the respondent had been entered into on 18.05.2006. Clause 18 of the said

agreement contains provisions with regard to the arbitration. The said clause reads as under :

> "18. ARBITRATION
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> 18.1 In the event of any dispute or difference relating to the interpretation and application of the provision of this Agreement, such dispute or difference shall be referred by either party to the arbitration under the Arbitration & Conciliation Act 1996. The arbitration shall be made by a sole arbitrator nominated by CMD of Pawan Hans Helicopters Ltd. The award of the Arbitrator shall be binding upon the parties to the dispute. The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator.
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> Place of Arbitration shall be Delhi."

A plain reading of the aforesaid clause indicates that if there is a dispute or difference relating to the interpretation or application of any of the provisions of the agreement, such dispute or difference is to be referred by either party to arbitration under the said Act and the arbitration is to be conducted by a sole arbitrator to be nominated by the CMD (Chairman-cum-Managing Director) of Pawan Hans Helicopters Limited (Respondent herein).

3. The undisputed facts are that certain differences and disputes arose between the parties. By a letter dated 03.10.2006, the petitioner, through its advocates, called upon the respondent to make payment of an

amount of Rs 1,37,26,620/- with interest @ 12% per annum within 7 days on account of various claims, details of which were given in paragraph 21 of the said letter. The letter specifically stated that, in case, the payment is not made within 7 days of receipt of the notice, the petitioner would initiate appropriate legal proceedings against the respondent at the cost, risk and consequences of the respondent. According to the learned counsel for the petitioner, this amounted to an invocation of the arbitration clause. On the other hand, the learned counsel for the respondent submitted that this letter was only a letter notifying the respondent of the petitioner's claims and that, in case, the respondent did not pay within 7 days then the petitioner would initiate appropriate legal proceedings. He submitted that this cannot be construed as an invocation of the arbitration clause.

4. The respondent did not pay within 7 days or at any point thereafter. According to the learned counsel for the petitioner the 30 days period, as indicated in the Supreme Court decision in ***Datar Switchgears Ltd v Tata Finance Ltd and Another : (2000) 8 SCC 151,*** had expired and, therefore, the petitioner filed the present petition under Section 11(6) of the said Act on 14.12.2006 for the appointment of an arbitrator. On 08.01.2007 when the matter came up for hearing before this court for the first time, notice was issued, returnable on 19.03.2007. On that date, the

counsel for the respondent appeared and directions were issued with regard to completion of pleadings. The next date of hearing was fixed for 17.08.2007. But before 17.08.2007 was to arrive, the respondent issued a legal notice on 23.07.2007 setting out its claims against the petitioner to the extent of Rs 81 lacs. The petitioner was called upon to make the payment of Rs 81 lacs along with interest @ 18% per annum within a week, failing which the respondent indicated that it would invoke the arbitration clause as provided in the contract between them. Since no response was received from the petitioner within the stipulated period of 7 days, the respondent purportedly invoked the arbitration clause and appointed an arbitrator on 03.08.2007 in respect of its claims against the petitioner. The matter has now come up for hearing and it has been contended by the learned counsel for the petitioner that even if the notice issued on 03.10.2006 cannot be regarded as an invocation of the arbitration clause, the present petition itself may be construed as a request for arbitration. Even thereafter the respondent did not bother to apprise this court of its intention to appoint an arbitrator. Instead the respondent thought it fit to present a fait accompli by issuing the notice dated 23.07.2007 and by appointing an arbitrator on 03.08.2007 in respect of its claims against the petitioner, completely side-stepping the claims of the petitioner against the respondent and the pendency of the present petition.

In these circumstances, the learned counsel for the petitioner submitted that an independent arbitrator ought to be appointed by this court in exercise of the power under Section 11(6) of the said Act.

5. The learned counsel for the respondent submitted that, as per the agreement between the parties, the Chairman-cum-Managing Director of the respondent was to nominate the arbitrator. He submitted that the letter dated 03.10.2006 does not contain any invocation for arbitration and only indicates an intention that, in case, the demand made by the petitioner is not made by the respondent then the petitioner would initiate legal proceedings. According to him, this meant that if the respondent did not make the payment to the petitioner, as demanded, then the petitioner would take the next step by invoking the arbitration clause. He submitted that next step has not been taken by the petitioner and no request for arbitration had been made prior to the filing of the present petition under Section 11(6) of the said Act. The learned counsel then referred to the provisions of Section 21 of the said Act which indicate that arbitral proceedings commence on the date on which a request that the dispute be referred to arbitration is received by the respondent. He submits that no such request was received. He then referred to the provisions of Section 11 and, in particular, to Section 11(6) which outlines the pre-conditions which need

to be fulfilled before which the Chief Justice or his designate could exercise powers for appointment of an arbitrator. He submitted that one of the conditions is that the party called upon to act under the agreement, fails to act as required under that procedure. Inter alia, it is also provided that where a person, including an institution, fails to perform any function entrusted to him or it under that procedure then the Chief Justice or his designate may exercise powers under Section 11(6) and appoint an arbitrator. None of these pre-conditions stand satisfied, according to the learned counsel for the respondent. He submitted that, therefore, this petition under Section 11(6) is *per se* not maintainable. He also referred to the decision of the Supreme Court in ***Datar switchgears Ltd*** (supra) and, in particular, he referred to a portion of paragraph 6 thereof which reads as under :

> "..... An application under sub-section (6) of Section 11 can be filed when there is a failure of the procedure for appointment of an arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an arbitrator refuses to appoint the arbitrator or where two appointed arbitrators fail to appoint the third arbitrator. If the appointment of an arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of an arbitrator."

6. I have considered the rival contentions of the parties. Before the provisions of Section 11(6) of the Arbitration Act can be invoked, it is necessary that the pre-conditions stipulated in clauses (a), (b) and (c) are fulfilled. In the present case, we are not concerned with clause (b) of Sub-Section (6) of Section 11 of the said Act. However, for the fulfillment of the pre-conditions stipulated in clauses (a) or (c), it is necessary that a party must fail to act as required under the agreed procedure for appointment of an arbitrator or the concerned person or institution must fail to perform any function entrusted to him or it under the procedure for appointment of an arbitrator. In the present case, the arbitration clause stipulated that the arbitrator was to be appointed by the Chairman-cum-Managing Director. But, before there could be a failure to act or a failure to perform a function as required under clauses (a) and (c), it must be shown that the arbitration clause was invoked by one party. If, upon such invocation, the respondent failed to act as per the agreed procedure or the Chairman-cum-Managing Director failed to nominate a person to act as a sole arbitrator. Then, the power under section 11(6) could be exercised, not otherwise. In the present case, I find that the letter dated 03.10.2006 did not invoke the arbitration clause. As submitted by the learned counsel for the respondent, it merely raised a claim against the respondent and disclosed an intent to initiate legal proceedings in case the respondent did

not pay the claimed amount. There was no request from the petitioner to the respondent in terms of clause 18 of the agreement, calling upon the respondent to appoint an arbitrator. Therefore, there was no question of the respondent failing to act under the agreed procedure stipulated in Clause 18 of the said Agreement. Consequently, the Chairman-cum-Managing Director also cannot be said to have failed to perform his function of nominating the sole arbitrator. The conclusion, therefore, is that the petition under Section 11(6) of the said Act filed by the petitioner is not maintainable as the pre-conditions for exercise of the powers of the Chief Justice or his designate under that provision have not been satisfied.

7. However, this court cannot also lose sight of the manner in which the respondent has gone about and appointed an arbitrator on 03.08.2007. The respondent was well aware of the fact that a petition under Section 11(6) was pending before this court. It was also well aware that the petition was for the appointment of an arbitrator in respect of the claims which had already been notified by the petitioner to the respondent. The respondent, however, went ahead during the pendency of these proceedings and issued a notice dated 23.07.2007 in respect of its claims against the petitioner. The letter dated 23.07.2007 does not even mention the pendency of the present proceedings with regard to the appointment of

an arbitrator in connection with the claims raised by the petitioner. Again, the letter dated 03.08.2007, whereby the arbitrator was sought to be appointed by the petitioner, is only in respect of the claims made by the respondent against the petitioner. To my mind, such a practice, though not amounting to contempt, does border on that. The respondent has shown scant regard for the pendency of the proceedings before this court and has attempted at presenting the court with a fait accompli. This cannot be permitted by this court. Consequently, while I dismiss the present petition as being not maintainable I also set aside the appointment of the arbitrator by the respondent appointed by its letter dated 03.08.2007. Giving the benefit of doubt to the respondent with regard to its intent, I direct that since the request has now been made by the petitioner and also by the respondent and as there exist disputes which need to be referred to arbitration, the Chairman-cum-Managing Director, as per the agreed procedure, shall appoint an arbitrator within two weeks. I also make it clear that the Chairman-cum-Managing Director, while considering the persons to be appointed as an arbitrator, may broaden his vision and may consider the question of appointment of a former Judge of this court to be appointed as an arbitrator to go into the disputes raised by the petitioner as well as by the respondent. This would also be appropriate in view of the history of this case.

The petition stands disposed of accordingly.

BADAR DURREZ AHMED
(JUDGE)

October 08, 2007
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